IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-722

WILLIAM MICHAEL FIELDS,
Petitioner,

versus

DEKALB COUNTY, GEORGIA,
Respondent,

UNITED STATES OF AMERICA,
Respondent and Third-Party Plaintiff,

versus

MACHINERY BUYERS CORP., and
SOUTHEAST MACHINERY, INC.,
Respondent and Third-Party Defendants.

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

Petitioner, William Michael Fields, respectfully submits this his Brief on the Merits pursuant to Order of this Court dated January 17, 1977, granting Petitioner's Request for Writ of Certiorari and consolidating this case with Case Numbers 76-607, 76-659, and 76-700.

OPINIONS BELOW

The initial panel decision and the *en banc* decision of the Fifth Circuit of Appeals are reported at 526 F.2d 679 and 538 F.2d 643, and are reprinted at pages 1a through 17a and 1b through 21b of the Appendix to the Fields Petition for Writ of Certiorari. The Order of the District Court dismissing the Fields Complaint and the District Court Order denying the Motion for Reconsideration are reprinted at pages 1c through 5c and 1d through 11d of the Appendix to William Michael Fields' Petition for Writ of Certiorari.

Final Judgment entered by the District Court is reproduced at page 313 through 315 of the Joint Appendix.[1]

JURISDICTION

The original panel decision of the Fifth Circuit Court of Appeals was entered on January 30, 1976, and upon Respondent, DeKalb County's timely Petition for Rehearing *en banc*, same was granted on April 5, 1976. The *en banc* decision of the Fifth Circuit Court of Appeals was entered on August 5, 1976 and Judgment on Rehearing *en banc* was entered on the same date. The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. §1254(1).

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[1] Hereinafter all references to Petitioner's Appendix shall be designated as "PA __" and all references to the Joint Appendix shall be designated as "JA __"

STATUTES INVOLVED

The following Acts and Statutes are relevant to the questions presented by the Petition:

"Project applications for airport development

Submission

(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading drainage, seeding, paving, lighting, and safety of approaches.

Public agencies subject to State law

(b) Nothing in this subchapter shall authorize the submission of a project application by any municipality or other public agency which is subject to the law of any State if the submission of the project application by the municipality or other public agency is prohibited by the law of that State.

Approval

(c) (1) All airport development projects shall be subject to the approval of the Secretary, which approval

may be given only if he is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal authority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

No airport development project may be approved by the Secretary with respect to any airport unless a public agency or the United States or an agency thereof holds good title, satisfactory to the Secretary, to the landing area of the airport or the site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(2) No airport development project may be approved by the Secretary which does not include provision for the installation of the landing aids specified in subsection (d) of section 1717 of this title and determined by him to be required for the safe and efficient use of the airport by aircraft taking into account the category of the airport and the type and volume of traffic utilizing the airport.

(3) No airport development project may be approved by the Secretary unless he is satisfied that fair consid-

eration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect. . . ."

(Pub. L. 91-258, Title I, §16, May 21, 1970, 84 Stat. 226; 1970 Reort. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Pub. L. 93-44, §4, June 18, 1973; 87 Stat. 89. 49 U.S.C. §1716.)

"Project sponsorship requirements; compliance; contracts between Secretary and public agencies; air traffic control activities; relief of sponsors

As a condition precedent to his approval on an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—

Public use

(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

Maintenance and operation

(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

Airport hazards

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

Compatible use of adjacent land

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

Government use; charge

(5) all of the facilities of the airport developed with Federal financial assistance and those usable for landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operat-

ing and maintaining the facilities used;

Air traffic control activities

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

Accounting

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

Self-sustaining fee and rental structure

(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection;

Reports

(9) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request; and

Inspection of records

(10) the airport and all airport records will be available for inspection by any duly authorized agent of

the Secretary upon reasonable request.

To insure compliance with this section, the Secretary shall prescribe such project sponsorship, requirements, consistent with the terms of this subchapter, as he considers necessary. Among other steps to insure such compliance the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, he is authorized to relieve the sponsor from any contractual obligation entered into under this subchapter or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent he finds that space no longer required for the purposes set forth in paragraph (6) of this section."

(Pub.L. 91-258, Title I, §18, May 21, 1970, 84 Stat. 229. 49 U.S.C. §1718.)

"Municipalities, etc., may acquire airports

Municipalities, counties, and other political subdivisions are hereby authorized, separately and jointly, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such municipalities, counties, and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties, or political subdivisions. All counties in the State of

Georgia which are located on the boundary line between the State of Georgia and any other State as well as all municipalities and other political subdivisions which are located in such boundary counties, are hereby authorized, separately, jointly with each other or jointly with any county, municipality or political subdivision of any such border State, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such border counties and the municipalities and other political subdivisions therein contained in the State of Georgia or within the geographical limits of any county, municipality or political subdivision of any such border State other than the State of Georgia."

(Acts 1933, p. 102; 1941, p. 380. Georgia Code Annotated §11-201.)

"Airport Zoning; things to be considered in adopting or revising

In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the Federal Government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport."

(Acts 1946, pp. 121, 123. Georgia Code Annotated §11-405.)

"Parties to actions on contracts

As a general rule, the action on a contract, whether express or implied, or whether by patrol or under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

(Acts 1949, p. 455. Georgia Code Annotated §3-108.)

QUESTIONS PRESENTED

I. Whether under Federal Common Law there exists a cause of action in favor of one who is injured as a result of a breach of the Airport Grant Agreements entered into between the Federal Aviation Administration and a local county unit, as against that county unit, for the maintenance of a condition hazardous to aeronautical safety.

II. Where a local county unit breaches the terms and conditions of the Airport Grant Agreements entered into with the Federal Aviation Administration, said breach proximately causing harm to a non-contracting party, whether State law should apply to determine the rights and liabilities between said county and the non-contracting party, and if so, is said non-contracting party a third-party beneficiary entitled to maintain an action for breach of contract.

III. Where the Federal Aviation Act imposes upon a county duties and obligations in connection with the operation and maintenance of an airport facility, is a civil remedy created in favor of one injured as a result

of a violation of the statutorily defined duties.

STATEMENT OF THE CASE

This action arises from injuries sustained by the Petitioner as a result of the crash of a Lear Jet Model 24 Aircraft, Federal Aviation Administration (FAA) Registration Number N-454RN, which crash occurred in DeKalb County, Georgia, on February 26, 1973. As the rulings in question were entered pursuant to DeKalb County's Motion to Dismiss, all allegations of the Petitioner's Complaint must be accepted for purposes of this appeal as being true. *Ward v. Hudnell*, 336 F.2d 247, 249 (5th Cir. 1966). Those allegations material to this Honorable Court's review are as follows:

On February 26, 1973, at approximately 10:12 A.M., E.S.T., a Lear Jet Model 24 Aircraft, N-454RN, was in the process of taking off from runway 20-L at DeKalb Peachtree Airport, Atlanta, DeKalb County, Georgia. Immediately after becoming airborne, and while within the boundaries of the airport, the turbine or jet engine of said aircraft ingested a large number of birds, causing a sudden power loss in both engines, and the crash and total destruction of said aircraft, and death of all seven persons aboard the aircraft. (JA-257). Prior to crashing, the aircraft passed over the Plaintiff spewing burning fuel and as a result Plaintiff and his property were engulfed by burning fuel and flames resulting in critical injury to William Michael Fields. (JA-258).

After the crash, the remains of many dead starlings or cowbirds or similar birds were found at or near the departure end of runway 20-L, and bird remains and particles of protein matter were found on the airplane windshield and center post and in the airplane engines.

Also, immediately prior to and after the crash large flocks of starlings, cowbirds, or similar birds were located in and about the airport boundaries and the adjacent garbage dump operated by DeKalb County. (JA-261).

DeKalb County, Georgia owns and operates DeKalb Peachtree Airport. DeKalb County, Georgia further owned and operated an open garbage dump next to one of the airport runways and prior to the aforementioned crash had actual knowledge that birds could be ingested into jet engines and that jet engine bird ingestion could cause engine failure and a resulting crash. Respondent, DeKalb County further had actual knowledge that the bird-attracting garbage dump existing at the end of the jet runway 20L constituted a serious and dangerous airport hazard. (JA-261, 266-285).

Prior to the crash the United States of America and DeKalb County, Georgia entered into a number of Grant Agreements pursuant to the Federal Airport and Airway Development Act, 49 USCA §1711, *et seq.*, and such Act's predecessor, The Federal Airport Act, 49 U.S.C. §1110, *et seq.*

DeKalb County failed to comply with several provisions of the Grant Agreements plan by maintaining open garbage dump. DeKalb County made assurances to the Federal Government that such dump would be closed. (JA-274).

The Plaintiff sued DeKalb County, H. F. Manget, Jr., American Home Assurance Company, and the United States of America. Plaintiff's Complaint alleges facts supporting liability of DeKalb County on several grounds. It is alleged that the maintenance of an open

garbage dump constitutes a public and private nuisance as defined by State law and an airport hazard as defined by Federal law. (JA-277, 289). Negligence is alleged in that the County was maintaining an hazardous condition in violation of several statutes and in spite of their knowledge of the existence of such dangerous condition. (JA-279, 283, 285). An additional ground of liability as alleged in the Complaint is that the Petitioner is the third-party beneficiary of the Grant Agreements entered into between DeKalb County and the United States of America. (JA-277, 279, 290). The relevant portions of such Agreements are as follows:

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal aid for the Project or any portion thereof made by the FAA, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.
>
> 2. The Sponsor will operate the Airport as such for the use and benefit of the public. . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public . . . .
>
> 6. The Sponsor will operate and maintain in a safe and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the Airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for Airport purposes: . . .

> 11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants herein made . . . .
>
> 12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the original layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might affect the safety, utility, or efficiency of the Airport.
>
> 13. Insofar as it is within its power and to the extent reasonable, the Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft." (JA-224-225).

Prior to the subject accident, DeKalb County purchased a liability insurance policy providing bodily injury liability insurance with respect to the ownership, operation, management and maintenance of the Airport, and Petitioner's claim falls within the limits of such policy. Such insurance contains a "waiver of governmental immunity" rider which provides as follows:

> "It is agreed that the company waives any right to deny liability under the policy or to refuse payments within the limits thereof by reason of the non-liability of the insured political subdivision for the wrongful or negligent acts of its agents and

> employees and its immunity from suit as an agency of the State performing governmental functions." (JA-286).

Petitioner's Complaint asserted three principal claims against DeKalb County, those being, negligence, maintenance of a public and private nuisance, and breach of certain agreements entered into between DeKalb County and the FAA. (JA-252-291).

In this case and in the consolidated actions the District Court granted DeKalb County's Motion to Dismiss on the theory that governmental immunity barred any claims against DeKalb County. (PA 1c-5c; 1d-11d, JA 313-315).

An Appeal was made to the Fifth Circuit Court of Appeals from the Order dismissing DeKalb County, and on January 30, 1976, Fifth Circuit Panel of Circuit Judges Godbold, Dyer and Morgan issued a decision reversing the District Court Dismissal Order. 526 F.2d 679 (PA 1b-21b). This decision affirmed the trial court's ruling with respect to Petitioner's claims against DeKalb County based on negligence and nuisance. However, it held that under Georgia law sovereign immunity did not bar a claim based upon breach of contract and that the Petitioner was a third-party beneficiary of the covenants entered into by DeKalb County in the Grant Agreements executed with the FAA.

Circuit Judge Dyer wrote a dissenting opinion stating that the merits should be decided under Federal Common law as opposed to Georgia law and accordingly, Petitioner lacked standing to sue as a third-party beneficiary.

DeKalb County filed a timely Motion for Rehearing *en banc* which was granted April 5, 1976. 526 F.2d 688.

In an eight to five decision, the Fifth Circuit sitting *en banc* on August 25, 1976, adopted Parts I, II, and IV of the majority panel opinion respecting Petitioner's claims for recovery on negligence and nuisance and adopted the dissenting opinion of Judge Dyer in lieu of Part III, of the majority panel opinion respecting Petitioner's right to recover as a third-party beneficiary of the covenants contained in the Grant Agreements. 538 F.2d 643 (PA 1a). The result of this opinion was to dismiss all of Petitioner's claims including breach of contract as against DeKalb County. The five dissenting members of the *en banc* court urged that Petitioner did have standing to sue as a third-party beneficiary of the Grant Agreements and four of the dissenting Judges argued that Federal Common Law was inapplicable. (PA 4a). Petitioner timely filed its Petition for Writ of Certiorari which was granted by this Court January 17, 1977. The Order granting Writ of Certiorari consolidated this action with the other actions involved and the decisions rendered by the Court of Appeals.

SUMMARY OF ARGUMENT

The Respondent, DeKalb County, entered into several contracts (Grant Agreements) with the Federal Government by and through the FAA and pursuant to the Federal Aviation Act whereby DeKalb County would receive monies for the development and maintenance of the DeKalb Peachtree Airport. Fundamental to these Grant Agreements was the requirement that the Sponsor, DeKalb County, enter into written promises intended to insure the safe operation of the Airport. These assurances were breached by DeKalb County by the maintenance of an open garbage dump at the end

of runway 20-L, said dump constituting a serious airport hazard inasmuch as birds were attracted to the open refuse. At all times material hereto DeKalb County had actual knowledge of the serious hazard created by the presence of birds with respect to jet aircraft travel. As a result of the breach of the written assurances, Lear Jet Model 24 Aircraft N-454RN crashed causing death, grievous personal injury and property damage.

The written assurances required of DeKalb County by the FAA were intended for the benefit of the flying public and those on the ground whose lives and property would be endangered by the failure of DeKalb County to abide by its commitments. As such, Petitioner, who was within the zone of danger created by DeKalb County's breach of its covenants, was an intended third-party beneficiary under the Grant Agreements and therefore is entitled to bring this action pursuant to either Federal Common law or Georgia State law.

In addition, the Federal Aviation Act imposed upon DeKalb County certain obligations and duties. The obligations and duties inured to the benefit of Petitioner as he was distinctly within the class of persons sought to be protected by such obligations. As a result, there was created by the Federal Aviation Act an implied civil remedy which would allow Petitioner to maintain this action against DeKalb County.

ARGUMENT AND CITATION OF AUTHORITY

The Fifth Circuit in reaching its decision concluded that Petitioner, William Michael Fields, was an "incidental beneficiary" to the Grant Agreements entered into by the FAA and DeKalb County. A review of the

majority *en banc* opinion leads to the conclusion that it is of no significance whether the case is decided under Federal Common Law or Georgia State law as either would allow recovery only to an "intended" beneficiary. On the other hand, Justice Morgan's well-reasoned dissent concludes that the Petitioner is an intended beneficiary under either Federal Common Law or Georgia State law. As will be hereinafter demonstrated, the very purpose of the assurances alleged to be breached by DeKalb County was to insure and promote safety in air traffic and to prevent the very type of disaster which befell those aboard the subject aircraft.

I. FEDERAL COMMON LAW SUPPORTS THE RIGHT OF PETITIONER TO RECOVER OF THE DEFENDANT, DEKALB COUNTY, BASED UPON ITS BREACH OF THE COVENANTS CONTAINED IN THE GRANT AGREEMENTS.

DeKalb County, in entering into the Grant Agreements whereby it would receive money for the development and maintenance of the air facilities at DeKalb Peachtree Airport made written promises respecting the operation of the Airport facility pursuant to 49 U.S.C. §1718 among which were the following:

(1) That the Airport would be suitably operated and maintained;

(2) That all aerial approaches be adequately cleared and protected; and,

(3) That existing airport hazards would be mitigated; and,

(4) That the establishment or creation of future airport hazards would be prevented; and,

(5) That appropriate action would be taken to restrict the use of land adjacent to and in the im-

mediate vicinity of the Airport to activities and purposes compatible with Airport operations, including landing and take-off of aircraft.

The basis of the Fifth Circuit *en banc* majority opinion is that such assurances as required by the Federal Aviation Act were only to prevent the possible waste or misuse of Federal funds and were not in any way intended to benefit those whose lives and property would be endangered by failure of the sponsor (DeKalb County) to abide by its contractual obligations. 526 F.2d 687. As will be shown, the opposite conclusion is compelled whether resort is had to Federal Common Law or Georgia State law.

There is, of course, justification for resorting to Federal Common Law to determine whether non-contracting parties have standing to sue as third-party beneficiaries for breach of the aforementioned Grant Agreements. Most compelling is the interest of the Federal Government in having a uniformity of decisions controlling the interpretation of contracts to which it is a party. *United States v. Seckinger*, 397 U.S. 203 (1970); *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *First National Bank v. Small Business Administration*, 429 F.2d 280 (5th Cir. 1970).

Assuming therefore, *arguendo*, that Federal Common Law is applicable, there is ample authority compelling the right of William Michael Fields to recover of DeKalb County for breach of the provisions of the Grant Agreements.

Rapp v. Eastern Air Lines, Inc., 264 F.Supp. 673 (E.D. Pa. 1967), has remarkable factual similarity to the instant case. *Rapp* also presented a garbage dump and weeds in fatally close proximity to Boston's Logan Air-

port. A number of birds which were attracted to this hazard were ingested by the jet engines of a departing Eastern Airlines jet, causing sudden loss of power and immediate crash. The existence of such a hazard constituted a breach of the same type Grant Agreements, and the Government was held responsible for damages caused to a non-contracting party for the breach of covenants contained in the Grant Agreements. 264 F.Supp. 681, 682.

Of particular importance is the case of *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1972) wherein the Ninth Circuit reached a different result from that of the Court below. In *City of Inglewood*, review was made of the Grant Agreements and the legislative history to determine the question of standing to sue. The Court found as follows:

> "There is a further issue for this court to resolve—whether or not Inglewood has standing to enforce the Federal Aviation Administration Grant Agreements with Los Angeles under the provisions of 49 U.S.C.A. §1716(c) (3) and 1718(4). The District Court found that §1718(4) [then §1110(4)] was only intended to deal with the safety of the airplanes on take-off or landing; that the plaintiffs were not the intended beneficiaries of the Grant Agreements; and that the statutes imposed no duty on the defendant, City of Los Angeles, to give 'fair consideration' to neighboring residents. . . ."
>
> "We turn first to the question of the purpose of Sections 1716(c) (3) and 1718(4). The legislative history is silent regarding the intention of Congress in enacting Section 1717(c) (3). However, the legislative history of Section 1718(4) [Section 1110(4)] supports the theory that flight safety was not the sole purpose of the section. *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673 (E.D. Pa. 1967) cited

> by the District Court and the Appellee only deals with Section 1718(3) [then Section 1110(3)]. We conclude, contrary to the District Court, from the language of Section 1716(c) (3) and the legislative history of Section 1718(4) that *each were intended by the Congress to insure that the welfare of persons living close by airports* which were to receive government funds to engage in development projects *would receive 'fair consideration'* by the Secretary of Transportation. (Emphasis supplied). 451 F.2d at 955.

The Ninth Circuit then addressed itself to the question of whether City of Inglewood had standing to sue and after concluding affirmatively went on to hold:

> "If Los Angeles made the assurances required by Section 1716(c)(3) and Section 1718(4) and applied for various Grant Agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary. The Secretary merely *receives them for the benefit of, and in the place of, the surrounding communities and residents of the area.* Any other interpretation of Section 1716(c)(3) and Section 1718(4) deprives them of any meaning or effect." (Emphasis supplied). 451 F.2d at 956.

Clearly the interpretation placed upon these Sections by majority below would likewise deprive them of any meaning or effect.

It is clear that District Court Judge Williams in deciding the question of whether or not Inglewood had standing to sue as third-party beneficiaries of the Grant Agreements between the FAA and the City of Los

Angeles was of the opinion that the only intended beneficiaries of the assurances required in the Grant Agreements were those, such as the Petitioners herein, whose safety and well-being are jeopardized by a breach of the Agreements. The Ninth Circuit refused to so limit the class of intended beneficiaries.

In the action, *sub judice*, this Honorable Court is concerned with questions of flight safety. It is clear that just as in Inglewood it is not to DeKalb County's benefit to be required to promise to maintain the airport in a safe operating condition. Rather, Congress intended to assure the personal safety of the flying public as well as those on the ground whose lives and property might be affected by accidents resulting from unmitigated airport hazards.

The majority of the Court below relied upon the cases *Port of New York Authority v. Eastern Air Lines, Inc.*, 259 F.Supp. 745 (E.D. N.Y. 1966); *City and County of San Francisco v. Western Airlines, Inc.*, 204 Cal.App. 2d 105; 22 Cal. Rep. 216 (1962); and *Eastern Airlines v. Town of Islip*, 229 N.Y.S.2d 117 (1962) to reach their conclusion that there was no intention to compensate members of the public injured as a result of the breach of the Grant Agreements. Again, the same issue was faced by the Ninth Circuit in the *City of Inglewood* case:

> "Los Angeles attempts to find support for its position in the series of cases holding that third-parties cannot sue on Grant Agreements between airports and the Federal Aviation Administration based upon third-party beneficiary contract doctrine. *Port of New York Authority v. Eastern Air Lines, Inc.*, 259 F.Supp. 745 (E.D. N.Y. 1966); *San Francisco v. Western Airlines, Inc.*, 204 Cal.App.2d 105; 22 Cal.Rep. 216 (1962). We note that in both cases

> that the plaintiffs were airline companies and the provisions of the Federal Airport Act that they were attempting to enforce were not the provisions plaintiffs are attempting to enforce in this case." 451 F.2d, at 956.

The *Town of Islip* case (the third case relied upon by the majority) was a decision by a single state court trial judge applying New York law and not Federal Common law which the majority insist is applicable. That case is therefore clearly distinguishable and should be read in light of the trial court's opinion that the plaintiff's own negligence was the real cause of the incident in question.

In *Luedtke v. County of Milwaukee*, 451 F.2d 387 (7th Cir. 1975) the Seventh Circuit Court of Appeals citing *City of Inglewood v. City of Los Angeles* indicated that private non-contracting parties may qualify as intended beneficiaries under the Federal Aviation Act and FAA Grant Agreements. Additionally, in the recent case of *Rauch v. United Instruments, Inc.*, 45 U.S.L. Week 2333 (3rd Cir. 1976), the Third Circuit stated:

> "The Congressional objective of safety permeates the Federal Aviation Act, and the fostering of safe air travel was the Congressional motive for giving the administrator the authority to prescribe minimum safety standards governing aircraft appliances. In a broad sense, Congress was seeking to assure the personal safety of all persons who are potential passengers or crew members of aircraft *as well as those on the ground whose lives and property might be endangered by accidents resulting from unsafe aircraft. These are persons who constitute the class for whose especial benefit the safety provisions of the statute were enacted.*" (Emphasis added).

As Judge Morgan, speaking for the dissent, so adroitly pointed out, the majority's opinion is rested upon Re-

statement (First) Of Contracts, Section 145 (1932) [An authority 44 years old which antedates most of the major developments of the third-party beneficiary doctrine] and seven cases all of which are easily distinguishable.[2]

See also the case of *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973) dealing with aircraft certification. Plaintiffs therein were pilot and navigator of the plane which crashed allegedly as a result of a defective fuel system.

The court stated:

> "The Civil Aeronautics Act, the predecessor to the Federal Aviation Act of 1958, was enacted, and regulations promulgated thereunder, to promote Civil Aviation while assuring maximum safety in the air . . . [citations omitted]. The purpose of the certification of aircraft under the 1958 Act and Regulations was to reduce accidents, and the government may be liable for negligence in improper issuance of a type air-worthiness certificate. . . .

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[2] "None of these cases seem particularly applicable to the facts of this case. In two of the cases—*West v. Morrison Knudsen Company*, 451 F.2d 493 (9th Cir. 1971) and *Hensley v. United States*, 279 F.Supp. 548 (D. Mont. 1968)—the courts were utilizing Montana third-party beneficiary law. *Brotherton v. Merritt-Chapman and Scott Corp.*, 213 F.2d 477 (2d Cir. 1954), does not clearly state whether it is applying federal or state law, but in any event, that case involved an incidental beneficiary. *Mahler v. United States*, 306 F.2d 713 (3rd Cir. 1962), was a tort case, not a third-party beneficiary action. Two cases that disallowed third-party suits—*Johnson v. Redevelopment Agency*, 217 F.2d 872 (9th Cir. 1963) and *Sayre v. United States*, 282 F.Supp. 175 (N.D. Ohio 1967)—were limited to the facts of their case, facts which included a comprehensive federal statutory scheme on redevelopment that precluded such suits. Finally, *Housing Corp. of America v. United States*, 468 F.2d 922, 199 Ct.Cl. 705 (Ct.Cl. 1972), denied a third-party beneficiary action because the United States had fulfilled its duty under the contract and because a section of the contract explicitly prohibited third-party beneficiary actions." 526 F.2d 687.

> The safety of pilots and others aboard aircraft, as well as persons on the ground, depend upon the air-worthiness certification program under the Act." 479 F.2d at 658.

The reasoning of the Ninth Circuit again highlights the intention of Congress to assure the safety of pilots and others aboard aircraft, as well as persons on the ground. It is thus clear that the Congress has set about not only to create a uniform system of air traffic, but also to require that such system incorporate measures to result in maximum safety to those affected.

It is readily apparent that the decision of the majority in the instant action is in direct conflict with the above cited cases of other Circuits. Moreover, the instant decision is in irreconcilable conflict with the Fifth Circuit's earlier decision in the case of *Bossier Parrish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967). In that action it was held that black children were third-party beneficiaries of anti-discrimination covenants contained in Federal Aid Grant Agreements between the local school board and HEW. The Court further held that the children had standing as third-party beneficiaries to sue the local school board for the breach of those covenants.

Additionally, the case of *Seaboard Air Line Railroad v. Crisp County, Georgia*, 280 F.2d 873 (5th Cir. 1960), cert. denied 375 U.S. 942 (1961) held that a private party could maintain a tort action against the Georgia county for a license granted pursuant to the Federal Power Act to the County which imposed a duty upon the County to protect the property of private third-parties.

Finally, the reasoning of Judge Hall for the Central

District of California in the case of *Gabel v. Hughes Air Corp.*, 350 F.Supp. 612 (1972) is enlightening. The *Gabel* case will be discussed more fully later, but basically involved a midair collision and subsequent review of portions of the Federal Aviation Act and their purpose. The Court after reviewing specific portions of the Federal Aviation Act stated:

> "On top of the foregoing, the Report of the Congressional Committees accompanying the 1958 Act says, *inter alia*, that Title VI 'deals primarily with the powers and duties of the Administrator relating to *minimum standards of safety*.'
>
> But the requirement of safety is not limited to subchapter VI of the Federal Aviation Act of 1958.
>
> It permeates the whole Act." 350 F.Supp. at 616.

The Court in reference to the enumerated provisions specifically referring to "safety" continued:

> ". . . If the foregoing repetitive emphases by Congress on *safety* does not refer to the *safety of individuals* and does not impose a duty, the violation of which is a tortious or actionable wrong, then one is led to wonder just whose *safety* Congress was talking about, or if there is some safety that is in the public interest which does not include the saving of human lives. So often, unfortunately, lawyers and judges overlook the fundamentals. There could not be a plainer creation of a duty to provide safety than is set forth in the Act and regulations, and plainly Congress intended to grant remedies for the wrongs prohibited as the provisions of Chapter VI 'are in addition' to state remedies." 350 F.Supp. at 617.

It is readily apparent that under Federal Common law that the Petitioner is an intended beneficiary to the Grant Agreements and entitled to sue for the breach thereof.

II. THE LAW OF GEORGIA SHOULD BE APPLIED TO THE INSTANT ACTION TO DETERMINE PLAINTIFF'S RIGHT TO RECOVER AS A THIRD-PARTY BENEFICIARY.

While it is acknowledged that there are relevant considerations for the application of Federal Common Law it would appear that the overriding interests would dictate that State law apply. In determining the applicability of Federal or State law in a diversity action, Federal Court must be guided by the principles set out in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)and *Sequalae*. While that decision put to rest the concept of Federal General Common Law, Federal Common Law was given new life by the Supreme Court in the case of *Clearfield Trust Company v. United States*, 318 U.S. 363 (1973). In reaching the determination in *Clearfield* that Federal Common Law and not State law should be applied, this court held that the rights and duties of the United States on commercial paper that it issued should be controlled by Federal law. The overriding interest to be served is the desirability of the uniform application of law. Thus, where the rights and duties of the United States are at issue, there are cogent reasons for applying the *Clearfield* rationale. Accord, *United States v. Standard Oil Company of California*, 332 U.S. 301 (1947). However, where the rights and liabilities of the United States are not at issue, or where there does not exist an identifiable federal interest in the outcome of a particular case, or there is no impact on a federal fiscal policy, then the application of Federal Common Law must be closely scrutinized. In the instant action, the rights of two non-federal parties are at issue. While such rights involve a contract executed between one of the parties and the federal government, there is

no identifiable federal interest in the outcome of this litigation and it will have no impact upon a federal fiscal policy. In fact if such interest exists, it could only be served by allowing the instant action, thereby compelling adherence to the covenants of the Grant Agreement.

The only possible interest other than seeking the enforcement of the Grant Agreements which could be asserted for application of Federal law are far too speculative and far too remote to justify the application of Federal law to this transaction which is essentially of local concern. See *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. 29 (1956) and *Wallis v. Pan American Petroleum Corporation*, 384 U.S. 63 (1966). As stated by the dissent below,

> "We find the present case to be analogous to both *Parnell* and *Wallis*. Like *Parnell* and *Wallis*, the case involves litigation between private parties over a matter in which the Federal government has been somewhat involved, but in which no issue of the rights and liabilities together is being litigated and in which no federal interest demanding a uniform disposition is involved." 538 F.2d at 647.

Finally, the impact of the majority decision in this action on the already overburdened Federal Court must be considered.

28 U.S.C. §1331 provides:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Claims founded on Federal Common Law are to be construed as claims arising under the Constitution,

laws, or treaties of the United States, for purpose of Federal question jurisdiction under 28 U.S.C. §1331. *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Thus, the application of Federal Common Law to the instant action would require a result whereby any claim made as a third-party beneficiary to a contract involving the United States would invoke Federal question jurisdiction thereby increasing a burden on the courts. It is for these reasons that rights and liabilities of the Petitioner and DeKalb County should be resolved by the application of Georgia law.

Georgia Code Annotated §3-108 provides:

> "The beneficiary of a contract made between other parties for his benefit may maintain an action against the promissor on said contract."

The Georgia Supreme Court in *Deason v. DeKalb County*, 222 Ga. 63, 148 S.E.2d 414 (1966) held:

> "Counties are empowered to sue or be sued in any court. Code §23-1501, but 'a county is not liable to sue for any cause of action unless made so by statute.' Code §23-1502. However, an exception exists where a county breaches a contract it was authorized by law to undertake. . . . 'Whenever a county is made liable by statute for a demand, or is authorized by statute to contract, and in pursuance of such power does contract, then an action will lie against it to enforce such liability, or to enforce any rights growing out of such contract, although there is no statute expressly authorizing the bringing of an action for such purpose. . . .'" [citation omitted] 222 Ga. at 65.

The Georgia Supreme Court has also held that a person, even though he may not be a party to a contract or furnish any consideration for the promise, can bring

suit upon it if it is intended to confer benefit upon him. *Sheppard v. Bridges*, 137 Ga. 615, 74 S.E.2d 245 (1912); accord, *Holland v. Phillips*, 94 Ga.App. 361, 94 S.E.2d 503 (1956); *Smith v. Ledbetter Brothers, Inc.*, 111 Ga. App. 238, 141 S.E.2d 322 (1965); and *M. R. Thomason and Associates v. Wilson*, 125 Ga.App. 658, 188 S.E.2d 805 (1972).

Authority for operating airports in the State of Georgia is found in the *Uniform Airports Act*, Georgia Code Annotated, Chapter 11. In a case involving the defendant, DeKalb County, and this very airport DeKalb-Peachtree Airport, the Georgia Court of Appeals stated:

> "As we construed the Uniform Airports Act, Code Chapter 11-2, which expressly extends its coverage to Counties, as shown in the original opinion, the County is authorized to contract as it did here. The logical inverse inference of the Act is that, to the extent that the County is authorized to contract, it also may be sued upon the contract for breach or for interference with performance." *Southern Airways Co. v. DeKalb County*, 102 Ga.App. 850, 865; 118 S.E.2d 234 (1960).

Such actions are also authorized by the cases of *Hancock County v. Williams*, 230 Ga. 723, 198 S.E.2d 659 (1973) and *Seaboard Airline Railroad v. Crisp County, Georgia, supra.*

III. PETITIONER HAS AN IMPLIED CIVIL REMEDY UNDER THE FEDERAL AVIATION ACT FOR INJURIES SUSTAINED AS A RESULT OF A BREACH OF SAFETY STANDARDS CONTAINED IN THE ACT

There exists an implied civil remedy under the Federal Aviation Act for injuries sustained as a result of breach of safety standards contained in such act. The

final ground allowing recovery to this Petitioner would be the breach by DeKalb County of duties imposed upon it by the Federal Aviation Act.

The issue of whether a cause of action was created in favor of one injured or damaged as a result of a violation of the duty imposed by the Act was faced directly by Central District of California in *Gabel v. Hughes Air Corp., supra.* As earlier stated, this case involved a mid-air collision between a commercial carrier and a military jet. The Court found that the Federal Aviation Act and regulations promulgated thereunder by the FAA imposed a duty upon the defendant commercial carrier to perform its services with the highest possible degree of safety. It went on to hold that a violation of the duty imposed by the Act created a cause of action in favor of those injured and damaged.

In addressing this point the Court stated:

> ". . . the fundamentals here are that a duty is imposed by law; that the complaint alleges that defendants violated that duty; and that the plaintiffs were injured by that violation. Those three things are, and have always been, the essential elements for a tort liability." 350 F.Supp. at 617.

This Court in the case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) held that a complaint alleging that agents of the Federal Bureau of Narcotics acting under color of the federal authorities who made a warrantless entry of the petitioner's apartment searching same and arresting the petitioner, all without probable cause, stated a federal cause of action for damages. Justice Brennan, speaking for the majority and quoting from the earlier case of *Bell v. Hood,* 327 U.S. 678, 684 (1946) stated:

> "But 'it is . . . well settled that where legal rights

> have been invaded, and a federal statute provides for a general right to sue for such invasion, Federal Courts may use any available remedy to make good the wrong done." 403 U.S. at 394.

Justice Harlan in a concurring opinion stated:

> ". . . in suits for damages based on violations of Federal Statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the Statute." 403 U.S. at 402.

A similar concept was presented in the case of *Case Company v. Borak*, 377 U.S. 426 (1964) which involved a suit for damages for false and misleading statements prescribed by the Securities and Exchange Act and regulations thereunder. It was noted that the Act and regulations made no specific provisions for a private right of action. This Court held, however, that inasmuch as the Act had among its chief purposes the protection of investors, it therefore implied the availability of judicial relief where necessary to achieve the intended result. See also *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944) and *Dietrick v. Greaney*, 309 U.S. 190 (1940).

The *Tunstall* case was concerned with racial discrimination and referring to that case the *Gabel* court stated:

> "It cannot be argued that the *implied* right protected there [against racial discrimination] was greater than the rights of forty-nine people in an airplane *not to be killed*, where the act specifically and repeatedly commands the duty of *safety*." (Emphasis supplied) 350 F.Supp. at 620.

In *Town of East Haven v. Eastern Airlines, Inc.*, 282 F.Supp. 507 (D. Conn. 1968) the District Court reached the conclusion that an action was maintainable against Eastern Airlines under the Federal Aviation Act as that gave rise to a private right of action for trespass and nuisance by reason of alleged deviation of planes from the approved flight paths.

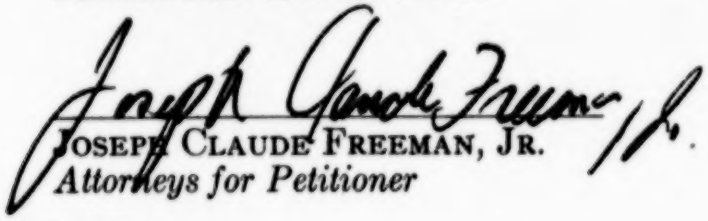
It is clear that the provisions of the Federal Aviation Act as respecting the obligations of DeKalb County create duties upon DeKalb County, which duties have been breached. Where the Congress has created a right, the Courts cannot be held powerless to effectuate a remedy.

> ". . . Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to just, fair remedies so as to grant the necessary relief." *Bell v. Hood*, 327 U.S. at 684.

CONCLUSION

For all the reasons stated herein, Petitioner respectfully prays this Honorable Court to reverse the decision and judgment of the Court below.

Respectfully submitted,
FREEMAN & HAWKINS



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